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No. 30.

Supreme Court of the United States

OCTOBER TERM 1942

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF OF GEORGE GRAY ZABRISKIE, COUNSEL FOR ARNOLD WOOD, JR., *AMICUS CURIAE*

GEORGE GRAY ZABRISKIE,
Counsel for Arnold Wood, Jr.,
Amicus Curiae.

October 5, 1942.

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Statement

It may seem superfluous to add anything to the argument of petitioner's leading counsel, who stands at the head of the American Bar, in support of the constitutionality of Section 124 of the Decedent Estate Law, and his brief naturally calls for little by way of supplement. However, one state of facts will suggest emphasis on one aspect of the same general question of law while another will bring out more strongly a different aspect. At least one point stated but not greatly stressed in the petitioner's brief is well illustrated by the facts in *Matter of Wood*, 33 N. Y. Supp. (2d) 726, decided in January 1942, and not published in the official reports.

At the end of his opinion in that case, which is printed as an appendix to this brief, the Surrogate of Westchester County reserved the question of apportioning the Federal Estate tax until the instant case should be finally determined. If this Court holds that statute unconstitutional, the Federal Estate Tax alone will take $26,961.12 out of the $29,125 residuary estate; otherwise only $4,120.10. As the decision in the case at bar is thus of great concern to the residuary legatee and devisee in the *Wood* case, as well as of great public importance, the consent of counsel for the petitioner and for the respondents has been obtained to file this brief as *amicus curiae* in his behalf. The principal points argued in the petitioner's brief will not be restated here any further than necessary to connect them with whatever there is to say in addition.

Summary of Argument

The key to the meaning of Section 826 (b) of the Internal Revenue Code, against which Section 124 of the Decedent Estate Law is being tested, is the word "before" which appears twice in Section 826-(b). A fundamental error in the decision of the Court of Appeals is that the majority have construed Section 826 (b) as setting up priorities of rights or interests instead of dealing with priority in time.

In interpreting Section 826 (b) as inimical to the New York apportionment statute the Court of Appeals has given it a construction which is unreasonable, unauthorized and unjust. It is unreasonable because it is opposed to the sense of the matter. It is also unreasonable and unauthorized because it is opposed to the established principles of construction that unless the contrary clearly appears, a statute is presumptively intended to harmonize with existing law and facts, and, when reenacted, with intervening judicial, legislative and administrative interpretation. And it is unjust and unreasonable because it thwarts the testator's intent, the carrying out of which as far as possible

is a fundamental principle of all law having to do with estates. It is this last point that is particularly illustrated by the *Wood* case, where the court found that the testator wanted Arnold Wood, Jr. to have the residuary real estate or its proceeds, even though that meant abating the general legacies to a substantial extent.

FIRST POINT

There is no reason why Congress should have meant to fix the final incidence of the Federal Estate Tax; on the contrary, it must be credited with the intent to leave the matter to State Law.

1. The history and rationale of the statutes here involved are well set forth in the petitioner's brief and in Judge Desmond's dissenting opinion. A concise statement is found in *Matter of Ryle*, 170 Misc. 450, where the court said (pp. 452-3):

> "Procedural methods for determining the source of payment of estate taxes have been in the Internal Revenue Act since 1916. Substantially the same provision which now is section 314 of the Revenue Act of 1926 (U. S. Code, tit. 26, § 426) is to be found in the prior Internal Revenue Acts beginning with that of 1916. The statutory rule there declared was always subject to contrary direction by the will or instrument regulating the fund taxed. The Federal rule was a rule *against* proration unless the will or instrument otherwise directed. The current New York statute (Dec. Est. Law, § 124) is a rule *requiring* proration unless the will or instrument otherwise directs. The idea of proration is not novel. It has always been a matter of procedure rather than of substantive law.
>
> . . . . . .
>
> . . . While section 124 of the Decedent Estate Law was not operative on the date when this *inter vivos* trust of 1926 was created, the idea of statutory regulation of proration was already in the law by reason

> of article 10-B of the Tax Law. It was then accepted law that the burden of estate taxes was subject to state regulation. (*Edwards* v. *Slocum, supra*, decided 1923.) The acquiescence temporarily in the Federal rule did not disable this State to enact contrary legislation." • • •

2. The true intent of Section 826 (b) is best seen by transposing it and reading the last clause first, as in the complementary second paragraph of §124 of the Decedent Estate Law or as if it were a declaration of policy which nowadays so often precedes a statute. Section 826 (b) would then begin like this:

> It is the purpose and intent of this subchapter that so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution.

Primarily, this means exactly what it says. The plain purpose of the section is to get in the tax while the estate is intact in the executor's hands. It says to him, "First pay the tax, then distribute, unless that course is impracticable or the testator has otherwise ordered". There are many cases where it is a long and difficult task to value the estate and fix the tax, and in such cases, where the estate is clearly ample to pay all bequests, it is not reasonable or practicable to hold them all up and delay any distribution whatever until the amount of the tax is finally determined and paid. In those cases it is customary to make a partial distribution during the course of administration and withhold enough to take care of the taxes when they are finally determined. That has been done in the Wood estate. There are other instances where the will directs certain legacies to be paid immediately after the testator's death or the probate of the will. Mr. Wood so directed in his will with regard to three cash bequests and they were paid promptly after letters testamentary were issued. Secondarily, as shown

in petitioner's brief (pp. 35-38), this clause carries an implied instruction to the executor to distribute after paying the tax in accordance with the testator's directions or with the law of the jurisdiction.

With further explanatory paraphrasing and interpolation our transposed Section 826 (b) would continue somewhat as follows:

> If, however, the executor or administrator does not get possession of the whole taxable estate, or fails to withhold enough before distributing to cover the tax, so that the Government has to collect part or all of it from a legatee, the legatee shall be entitled to reimbursement by the executor or to "contribution by the persons whose interest in the estate of the decedent would have been reduced"—under the state law fixing its incidence—"if the tax had been paid before the distribution of the estate"—and not required to be apportioned thereafter—"or whose interest"—by the state law—"is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate".

The hypothesis that an executor might make a mistake as to the tax liability and in the amount he distributes is not fanciful. Many ways in which it might happen suggest themselves. It is one of the reasons why the practice in some states is to require refunding bonds (*Fitzpatrick's Estate*, 8 Pa. Dist. 726).

Unless Section 826 (b) is construed in this way it makes no sense. *Edwards* v. *Slocum*, 287 Fed. 651, 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, 264 U. S. 47, are sufficient authority for the proposition that it can make no difference to the United States whether the tax is chargeable proportionately to the various legatees or entirely to the residuary legatee, but that that is wholly a question of state law. The petitioner's brief makes this abundantly clear. Suppose, as the dissenting opinion and

the petitioner suggest (p. 36), there is no residue, or, as in the *Wood* case, that the residue consists wholly of real estate or its proceeds. Only the law of the state can say whose share shall be charged with the tax in such a case (*Irving Trust Co.* v. *Day*, 314 U. S. 556). Or suppose an executor reduces the estate to cash, pays the debts and administration expenses, ascertains the amount of the Federal estate tax and pays it, apportions it against the different legatees, pays each one his bequest less his proportionate share of the tax, and comes into court to have his account judicially settled. The Collector is not a party to be cited in such a proceeding. Would any court hold that he even had the right to intervene as a person interested in the estate and file objections to the account on the ground that the tax which he had received in full had subsequently been apportioned rather than all taken out of the residue? The question answers itself.

3. Section 826 (b) expressly authorizes the testator to apportion the tax himself by directing that each legatee shall bear his proportionate share. Or he could give a legatee, say $5,000 less an amount equal to his share of the total tax. If the testator is allowed to do this, the state of his domicile may undoubtedly annex to the privilege of making the will the condition that it may do the same thing, just as New York by Sections 17 and 18 of its Decedent Estate Law annexes the condition that charitable gifts in excess of half the estate, or other gifts beyond what the widow is entitled to claim, are so limited (*Irving Trust Co.* v. *Day, supra*).

SECOND POINT

The Court of Appeals has departed from established rules of statutory construction.

1. A fundamental principle of construction is that a statute is presumed to be intended to harmonize with existing law, both common and statutory, except so far as the contrary clearly appears either expressly or by necessary implication. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115; *Keck* v. *U. S.*, 172 U. S. 434, 446; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649. This and other principles of construction themselves constitute a national or federal common law on the subject (*Smith* v. *Alabama*, 124 U. S. 465, 478), though the common law by which the statute is tested is that of the States (*Erie R. R.* v. *Tompkins*, 304 U. S. 64).

A basic and universally accepted application of this rule is the principle just discussed, that the disposition, devolution, administration and distribution of estates are governed by the laws of the several states and not by Federal law (*Irving Trust Co.* v. *Day, supra; Mager* v. *Grima*, 8 How. 490).

2. Neither Congress nor the State legislatures function in a vacuum. When they pass a law they are presumed to know and give consideration to existing facts and circumstances to which it will apply. *State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177. There is no subject on which the leading members of the Committees who write the Revenue Acts are more certain to inform themselves than the laws and facts relative to New York estates, from which, according to the petitioner's brief (p. 7), a third of all Federal estate taxes are derived.

Thus when Congress re-enacted in Section 314(b) of the Revenue Act of 1924 what is now Section 826(b) of

the Revenue Code, which it carried over into all subsequent Acts, it knew that this Court in *Edwards* v. *Slocum*, 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, id. 47, had declared that the law of the State nevertheless determined who should bear the tax, and Congress must be presumed to have adopted that interpretation of the statute. *Heald* v. *District of Columbia*, 254 U. S. 20; *Latimer* v. *U. S.*, 223 U. S. 501; *Bruce* v. *Tobin*, 245 U. S. 18, 20.

And when Congress carried forward the present section 826(b) in the Revenue Act of 1932, which was in effect when Mrs. Del Drago made her will, and in the 1936 Act which was in force when Mr. Wood made his, it also knew that the New York Legislature, in the light of those decisions and after most careful study by a commission of distinguished judges and lawyers, had determined by Section 124 of the Decedent Estate Law that unless a testator directed otherwise, the tax should be apportioned. That was a construction by the New York Legislature of Section 826(b) which under the circumstances is entitled to respect. Congress further knew, at least by 1936, that under that Statute many New York estates had been administered and closed and their taxes paid, apportioned and accepted without cavil by the Federal Government. In other words it knew that the Treasury had acquiesced in these interpretations of Section 826(b), which was equivalent to adopting them as its own practical construction, and that again is presumed to have taken into consideration by Congress in carrying forward Section 826(b) year after year. *Constanzo* v. *Tillinghast*, 287 U. S. 341; *Mass. Mutual Life Co.* v. *U. S.*, 288 U. S. 269; *U. S.* v. *Cerecedo Hermanos*, 209 U. S. 337; *National Lead Co.* v. *U. S.*, 252 U. S. 140.

3. Another long established rule of construction is that revenue laws are not to be extended by construction beyond the clear import of the language used or so as to

embrace or encroach on other matters. *Gould* v. *Gould*, 245 U. S. 151; *U. S.* v. *Merriam*, 263 U. S. 179; *Miller* v. *Nut Margarine Co.*, 284 U. S. 498. In recent years this principle has sometimes been extended but only in order to uphold social legislation; otherwise it still holds good. It is not perceived how the welfare of any group could be promoted by a decision that the question of who should be charged with the Federal estate tax was one for Congress rather than the states to decide.

THIRD POINT

The construction given to Section 826(b) by the Court of Appeals is unreasonable and unjust because it frustrates the intention of great numbers of testators. Unless reversed it will lead to countless claims for tax refunds and suits against residuary legatees.

1. There is no rule of law more faithfully and universally applied than the principle that a testator's intention is to be carried out unless it is not well expressed or conflicts with the policy of the state as expressed in statutes or decisions. This rule applies to the construction both of wills themselves and of laws affecting them.

Matter of Rahn, 316 Mo. 492, cert. denied, 274 U. S. 745;
Speer v. *Colbert*, 200 U. S. 130;
Hardenbergh v. *Ray*, 151 U. S. 112;
Jenkins v. *First National Bank*, 107 Fed. (2d) 764;
Corbett v. *Nutt*, 10 Wall. 464, 479;
Smith v. *Bell*, 6 Pet. 68;
Amherst College v. *Ritch*, 151 N. Y. 282;
Thomas v. *Trustees*, 70 Ohio St. 92;
McGlade's Appeal, 99 Pa. 338.

2. A testator is presumed to know the law of his state and to make his will accordingly; in particular

he is presumed to know whether or not under that law estate taxes will be paid from the residue.

Matter of Duryea, 277 N. Y. 310.

Specifically, before it occurred to the Court of Appeals that Section 124 was unconstitutional, that Court declined to review a decision that a testator who made his will before Section 124 was enacted but died after it took effect was presumed to have contemplated that the Federal estate tax would be apportioned.

Matter of Stanfield, 170 Misc. 447, aff'd 257 App. Div. 932, leave to appeal denied 281 N. Y. 887.

In the case at bar the prevailing opinion below says (287 N. Y., p. 79):

> "Deceased knew the law when she made her will, and then knew that in the absence of directions to the contrary in the will all federal estate taxes would be payable out of her residuary estate and that her net estate, after deduction of the federal tax, would alone be available for distribution to legatees and she thereby took into account any alleged inequities that might result in its application".

That statement is wholly unsound. The law she was presumed to know and intend to write into her will did not stop with the bare words of Section 826(b). It included the judicial, legislative and administrative construction that had been placed on that statute as stated in the preceding point. It is to be presumed that when the testatrix and Mr. Wood made their respective wills they were advised that by failing to provide expressly for the incidence of the tax they would cause it to be apportioned and save their respective residuary bequests from being cut down by more than their proportionate shares of the tax. Judge Desmond has well stated the matter at the end of his dissenting opinion:

> "Why should we strain to hold this statute unconstitutional, when in so holding, we produce a result

which the testatrix plainly did not intend? The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section 124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could, by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. We should not do it for her."

3. This intention is expressly shown in the Wood will. As the Surrogate in his opinion says:

> "Article First directs that all estate and inheritance taxes with respect to gifts therein specified be paid out of the residuary estate, but the will is silent as to the payment of estate taxes with respect to any other gifts contained in the will".

This should be interpreted as a direction that the taxes on all the other bequests were to be charged against them *pro rata*. *Expressio unius est exclusio alterius* applies in the construction of wills as elsewhere. *Matter of McClure*, 63 Hun 430, aff'd 136 N. Y. 238. However, in view of the rigid construction of Section 826(b) by the Court of Appeals, the Surrogate quite naturally did not go so far as to pro rate the tax until this Court should have passed upon this case.

4. But more than that, in the *Wood* case the Surrogate took proof of the facts bearing on the testator's intent. He found that though the testator did not leave enough property to pay all his bequests, and though his nephew and residuary legatee Arnold Wood, Jr. stood in about the same relationship to him as his other legatees, nevertheless the testator held this nephew in such high regard that he would have desired him to receive the proceeds of the residuary real estate rather than that they should be applied to the deficiencies in the prior legacies. As shown at the outset of this brief that intention, based

on the testator's paramount affection for this favorite nephew, will be almost wholly frustrated if the tax on the bequests to other relatives should be taken out of the residuary bequest. Under the principles above stated this Court will surely not construe Section 826(b) in such a way as to bring about so unjust and unreasonable a result.

Haggar Co. v. *Helvering*, 308 U. S. 389;
Burnet v. *Guggenheim*, 288 U. S. 280;
Farmers L. & T. Co. v. *Minnesota*, 280 U. S. 204, 212.

5. Besides upsetting the testamentary intentions of thousands of testators whose estate taxes have been apportioned and paid under Section 124, an affirmance of the decision of the Court of Appeals will have another unfortunate consequence that will not have escaped the attention of this Court. It will lead to thousands of claims and suits by legatees whose bequests have been charged with their proportionate shares of estate taxes to recover those amounts. Where the three-year Federal statute has not run most of such claims will naturally be made against the Government (*White* v. *Hopkins*, 51 Fed. (2d) 159). In other cases, legatees will take advantage of the longer state statute of limitations to bring suit for money had and received against residuary legatees who have long ago been paid and perhaps spent their bequests. (*Norfolk* v. *Norfolk Co.*, 120 Va. 379; *Mason* v. *Prendergast*, 120 N. Y. 536; *Stone* v. *White*, 301 U. S. 532.) This Court will surely not construe the law in a way that will allow such results to follow if they can possibly be avoided.

All of which is respectfully submitted,

GEORGE GRAY ZABRISKIE,
Counsel for Arnold Wood, Jr.,
Amicus Curiae.

October 5, 1942.

Appendix

Opinion of Surrogate Millard
(33 N. Y. Supp. (2d) 726)

Matter of William C. Wood, dec'd—In the within accounting proceeding, the reports of the special guardians and the report of the attorney representing a nephew of decedent now in the military service of the United States, contain certain objections to the account which make it necessary to construe the will of the above named testator.

The testator, William C. Wood, died on July 6, 1939, a resident of Westchester County. His last will and testament, dated July 1, 1937, was admitted to probate, and letters testamentary issued on July 22, 1939, to Arnold Wood, Jr., and the United States Trust Company of New York, the executors therein named.

Under Article "First" of the will, cash legacies of $1,000 each were given to a sister-in-law, niece and nephew of the testator. Specific bequests of personalty were also made thereunder to Arnold Wood, a brother, and to Ethel Hartshorne Wood, a sister-in-law of testator. Specific bequests and specific devises were also made under Article "First" to Arnold Wood, Jr., the aforesaid nephew of testator, and being one of the petitioners herein.

The closing language of Article "First" directs that the aforementioned cash legacies be a first charge upon the estate. It further directs that all estate and inheritance taxes which may be imposed upon all of the legacies and devises specified therein, be paid from the residuary estate without apportionment or contribution from the beneficiaries thereof.

Article "Second" bequeaths various sums of money to relatives, ffiends and employees. Article "Third" devises an undivided interest in certain real estate to Arnold Wood, a brother, and Article "Fourth" devises other real estate to Gilbert Congdon Wood, Jr., a nephew of the testator.

Article "Fifth", creates three trusts of $25,000.00, $50,000.00 and $75,000.00, being respectively designated as subdivisions (a), (b) and (c) thereof. As to the $25,000 trust first hereinabove mentioned, the will directs that upon the termination of the life estate the principal "be and become a part of my said residuary estate to be distributed as provided in article Sixth hereof." Article "Sixth" reads as follows: "Sixth. All the rest, residue and remainder of my estate, real and personal, including any of the foregoing legacies which may lapse or fail to vest, herein referred to as my residuary estate, I bequeath and devise to my nephew said Arnold Wood, Jr., his heirs and assigns absolutely forever." Article "Eighth," subdivision (a) contains a power of sale in the following language: "Eighth (a) To hold any of the real estate left by me (other than the real estate devised by articles First, Third and Fourth of this my will) for such a period as they may deem wise not exceeding five years from the time of my decease, and to sell, mortgage and lease the same upon such terms as they may deem advisable."

Pursuant to said power of sale the executors have sold all real estate not specifically devised and there has been realized upon said sale the sum of $29,125.00.

Both objectants to the account have asked that the will be construed as follows:

(1) That the proceeds of the sale of real estate not specifically devised should be applied to the payment of

the legacies and trusts contained in Articles "Second" and "Fifth."

(2) That upon the termination of the trust in the principal sum of $25,000 created under subdivision (a) of Article "Fifth," the corpus thereof shall be applied to the payment of the legacies contained in Article "Second" and to the augumentation of the two other trusts contained in Article "Fifth."

(3) That all legatees and devisees bear their proportionate share of the estate taxes.

The testimony offered at a hearing held herein discloses that the testator and Arnold Wood, Jr., were very friendly, each visiting the other frequently. The fact that the testator appointed him an executor and trustee indicates that he held his said nephew in high regard. There was, however, no testimony produced establishing the relationship similar to that of parent and child between the testator and his said nephew. While the testimony of the draftsman of the will discloses certain declarations made by the testator at or about the time the will was executed, no evidence was produced establishing either the actual amount of the testator's estate at the time of the execution of the will or the proportion thereof of personalty and realty. However, the testator, at the time of the execution of the will, stated to the draftsman thereof that he expected to leave an estate of about $400,000. Moreover, the testimony does not disclose the date of acquisition of the real estate not specifically devised. The testimony, it may be said, fairly establishes that the testator, at the time of the execution of the will, was a man of about 72 years of age, quite active, and who personally handled his business affairs. The accounting herein indicates that the gross estate approximates $280,000 and that the net estate, after

distribution to legatees to the extent of $20,150.71 amounts to $203,800.99, subject to deduction of commissions and expenses of accounting. Included in the assets accounted for is the sum of $29,125 realized upon liquidation of two parcels of realty not specifically devised by the testator. Since the general legacies and trusts payable on death of the testator amounted to $269,000, the assets of the within estate will be insufficient for the payment in full of all gifts.

The general rule is that real estate is not charged with the payment of legacies, as a matter of course (Bevan v. Cooper, 72 N. Y. 317; Matter of Lilienthal, 139 Misc. 225, and authorities cited). The language of the will must be scrutinized carefully and the intent of the testator must be drawn therefrom in the light, however, of the circumstances surrounding the testator at the time of the execution thereof (Bevan v. Cooper, supra; Ely v. Megie, 219 N. Y. 112, and cases cited). Some of the factors to be considered as indicating an intention to charge realty were summarized in Matter of Lilienthal (supra) as follows: The knowledge of the testator at the time of the execution of the will of a deficiency in his personalty as compared with the legacies given by his will; the presence in the will of a direction that transfer taxes on the general legacies should be paid from the residue; the granting of a power of sale; the fact that general legatees were more the natural objects of testator's bounty than those named in the residuary clause; and, the blending of realty and personalty in the residuary clause.

Article "First" directs that all estate and inheritance taxes with respect to gifts therein specified be paid out of the residuary estate, but, the will is silent as to the payment of estate taxes with respect to any other gifts con-

tained in the will. The testimony discloses nothing to indicate that the testator knew or considered, at the time of the execution of the will, that there was a deficiency in his personalty as compared with the legacies given by his will. It is contended, however, that the power of sale contained in Article "Eighth" of the will evidenced an intention to charge said legacies and trusts upon the realty. Without exhaustively discussing the presence of a power of sale appearing in a will as indicating an intention to charge general legacies upon realty not specifically devised, it may be said that such incidence is not in itself conclusive. The relationship between the testator and the beneficiaries is an important consideration (Matter of Mould, 117 Misc., 1, aff'd 204 A. D., 889, aff'd 236 N. Y., 582, and cases cited). While it appears that said Arnold Wood, Jr., and most of the other legatees stood in about the same degree of relationship to the testator, certainly none of them was more the natural object of testator's bounty than his nephew Arnold Wood, Jr.

The blending of realty and personalty in the residuary clause is of relative unimportance in determining whether or not legacies ought to be charged on real estate passing under the residuary clause in a will (Matter of Lilienthal, supra).

From the language of the will read in the light of extrinsic circumstances surrounding the testator at the time of the execution thereof, I determine that the proper construction of the will in the case at bar precludes charging the general legacies upon real estate not specifically devised. It follows therefore that Arnold Wood, Jr., the residuary devisee, is entitled to the proceeds of the sale of such real estate.

Appendix

The general principle that a gift of a trust remainder to the residuary estate cannot become effective until all prior donations made by the will have been paid in full has been enunciated in Matter of Title Guarantee & Trust Company (195 N. Y., 339). Following the authority of said case, I hold that upon the termination of the trust set forth in subdivision (a) of article "Fifth" of the will, the corpus thereof must be applied to the full payments of the legacies contained in article "Second" and the trusts contained in subdivisions (b) and (c) of article "Fifth" before such corpus or any part thereof, shall pass into the residuary estate.

All State and Federal estate taxes imposed upon or in connection with the three $1,000 legacies set forth in article "First" must be paid from the residuary estate in conformance with the express language of the will.

As to all other gifts, the State estate tax will be borne by the persons interested in the estate, as provided by section 124 of the Decedent Estate Law. In view of the decision of the Court of Appeals in Matter of Del Drago, (287 N. Y., 61), holding said section unconstitutional in so far as it directs apportionment of the Federal estate taxes among the persons interested in the estate, the executors herein are directed to retain such reserve fund as is sufficient to cover the Federal estate taxes payable, pending final determination of such decision of the Court of Appeals. Final distribution thereof will be made by supplemental decree in this proceeding upon the application of any interested party, in accordance with such final determination in the Del Drago case.

Settle decree accordingly.